UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

UNITED STATES OF AMERICA, Plaintiff/Respondent, v. REGINALD LONNEL CRAY, Defendant/Movant.	)))))))))	Crim. Case No. 1:10-cr-0075

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE PURSUANT TO 28 U.S.C. § 2255

Reginald Lonnel Cray ("Cray"), by and through the undersigned counsel, respectfully submits this Memorandum of Points and Authorities in Support of Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255, and states as follows:

I. INTRODUCTION

Cray contends that he is "actually innocent" of at least one of the charges of which he was convicted. Cray further argues, if proven, that claim serves to allow this present motion. Additionally, Cray argues that he is not time-barred from filing the present motion.

Cray posits that once any procedural and time bars are overcome, this Court can rightfully hear Cray's substantive legal claims as set forth below. For this and other reasons, Cray is entitled to § 2255 relief.

II. STATEMENT OF THE CASE

Cray was charged by Indictment with the following offenses: Count One – Receipt of Child Pornography, in violation of 18 U.S.C. § 2252A(a)(2); and Count Two – Possession of Child Pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B). (Docket Entry ("DE") 1).

After filing numerous pre-trial motions, Cray proceeded to trial on September 22, 2010, and the jury returned guilty verdicts on both Counts One and Two of the Indictment. (DE 95). On February 17, 2011, Cray was sentenced by this Court to 144 months imprisonment on Count One, and to a concurrent term of 120 months on Count Two. A lifetime term of supervised release was imposed. (DE 129).

Cray timely filed a Notice of Appeal. (DE 110). Before the Eleventh Circuit, Cray's conviction and sentence were affirmed. *United States v. Cray*, 450 Fed. Appx. 923 (11th Cir. 2012). Cray then filed a petition for writ of *certiorari*, which was denied on October 1, 2012. *Cray v. United States*, 133 S.Ct. 265 (2012).

III. GROUND UPON WHICH RELIEF IS REQUESTED

A) CRAY IS "ACTUALLY INNOCENT" OF COUNT TWO OF THE INDICTMENT WHICH OVERCOMES ANY PROCEDURAL BARS TO THE INSTANT MOTION

1. Cray's Substantive "Actual Innocence" Claim

At the time of Cray's offenses,[1] Count Two of the Indictment, a violation of 18 U.S.C. § 2252A(a)(5)(B), Possession of Child Pornography, read as follows:

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[1] The Indictment charged that Cray's offenses occurred "[b]eginning on or about March 25, 2008, and continuing at least until on or about April 14, 2008…." (DE 1). There is no evidence any offenses with which Cray was charged took place after this time frame.

> Any person who…knowingly possess any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer…shall be punished…

United States v. Maxwell, 446 F.3d 1210, 1211 n. 1 (11th Cir. 2006).[2]

At the Motions and Pretrial Conference held on September 10, 2010, Assistant U.S. Attorney Greenwood stated: "[s]o even though those images aren't specifically found on the computer…" (DE 119, at 10). And, continuing: "[t]hat's correct. And we think that even though there's not evidence, direct evidence on the computer of those images present on the computer…." *Id*. at 12. Then Cray's attorney added, "Your Honor, we would remind the Court that, of course, none of the images are in the registry [of the computer]." The Court responded: "I understand." *Id*. at 36.

Thereafter, under cross-examination by Cray's attorney at trial, ICE Special Agent Michael Riccitelli testified as follows:

THE WITNESS: Can I clarify, your Honor?

THE COURT: You may.

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[2] In October 2008, Congress amended § 2252A(a)(5)(B) by inserting "or knowingly accesses with intent to view," after "possesses." Enhancing the Effective Prosecution of Child Pornography Act of 2007, Pub.L. 110–358, Title II § 203(b), 122 Stat. 4001, 4003 (2008). As currently worded, therefore, the statute applies to anyone who

> knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce…

18 U.S.C. § 2252A(a)(5)(B).

United States v.Shiver, 305 Fed. Appx. 640, 642 n. 4 (11th Cir. 2008).

THE WITNESS: If there is an artifact or remnant referring to the image then there's some remnant of the image. If you're asking me if that particular picture was found, I'm saying I'm unaware of it. But an artifact still reflects or points to an image or video at one point or another. I'm unaware of any actual picture or image or video that was actually found on the computer.

BY MR. GARCIA [defense counsel]:

Q. Do you know whether any CDs had any images at his house?

A. I'm not aware of any.

Q. Are you aware of any removable drives that had any images?

A. I'm not aware of any.

Q. And going back, I think we've said this, but when you said you can print these things and make them Adobe or whatever, you're unaware of any of that being at his house either, right?

A. Correct.

Q. Do you know if there's any evidence of file sharing on his computer?

A. I'm unaware of any.

Q. And do you have any evidence that he uploaded any pictures to the server?

A. I'm unaware of any.

Trial Transcripts, Vol. II (DE 118, at 245-46). The actual forensic computer examiner, ICE Special Agent Thomas West, later testified that as a result of his investigation of Cray's computer, "*I did find that there were no physical images or videos located on the hard drive of child pornography.*" Trial Transcripts, Vol. III (DE 118, at 443-444) (emphasis added).

As quoted above, the statute outlaws anyone who "possess any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography." 18 U.S.C. § 2252A(a)(5)(B). Based upon the evidence adduced at trial, Cray clearly did not possess any "book, magazine, periodical, film, videotape, computer disk" that contained an image of child pornography. That leaves only the residual term "other material" *id*., which the statue does not define. Cray now argues that he did not possess any "other material" containing an image of child pornography. Although the case law addressing this statutory term is sparse, another term "other matter" used statutorily in the same context guides the analysis by analogy.

In one case where the term "other material" (as opposed to "other matter") was actually construed, the Tenth Circuit opined:

> Applied to § 2252A(a)(5)(B), *ejusdem generis* advises that "any other material" should be construed as like in kind to, and no more expansive in scope than, "book, magazine, periodical, film, videotape, [and] computer disk." Those terms denote specific, concrete forms of media that are used to capture, store, or deliver information as a means of communication. They are tangible illustrations of media, rather than mediums themselves.

United States v. Brune, 767 F.3d 1009, 1023 (10th Cir. 2014).

Similarly, 18 U.S.C. § 2252(a)(4)(B), prohibits "[c]ertain activities relating to material involving sexual exploitation of minors" (and is so titled), and contains the resemblant term "other matter." Numerous courts have interpreted that term in a manner which supports Cray's present argument. For example,

> The principle of *ejusdem generis* supports our interpretation. This principle states that where general words ("other matter" in this case) follow the enumeration of particular classes of things ("books, magazines, periodicals, files, video tapes"), the general words will be construed as applying only to things of the same general class as those enumerated. The particular things mentioned in the statute are all physical media on which images are stored; so too is a negative strip. *To interpret "other matter" to refer to visual images would be to ignore the plain language of the statute.*

United States v. McKelvey, 203 F.3d 66, 71 (1st Cir. 2000) (emphasis added); *United States v. Lacy*, 119 F.3d 742, 748 (9th Cir. 1997):

> we conclude the "matter" is the physical medium that contains the visual depiction—in this case, the hard drive of Lacy's computer and the disks found in his apartment. This interpretation is supported by two principles of statutory interpretation, *noscitur a sociis* and *ejusdem generis*. "The first means that a word is understood by the associated words, the second, that a general term following more specific terms means that the things embraced in the general term are of the same kind as those denoted by the specific terms." [citations omitted]. Although canons of construction do not mandate how a phrase is to be read, they "describe[] what we usually mean by a particular manner of expression." [citation omitted]. Here, the word "matter" appears at the end of the list "books, magazines, periodicals, films, [and] video tapes," all of which are physical media capable of containing images.

Id. And in finding the statutory term "other matter" to be ambiguous and applying the "rule of lenity," the Second Circuit wrote "[i]n this case, 'other matter' should be construed to complete the class of items or things in the list preceding it, namely 'books, magazines, periodicals, films, [or] video tapes.'" *United States v. Dauray*, 215 F.3d 257, 262 (2d Cir. 2000). Further,

> Here, we have done what we can. We have read the plain language of § 2255(a)(4)(B), considered the traditional canons of statutory construction, looked for legislative history, and canvassed potentially relevant case law. And we are left with no more than a guess as to the proper meaning of the ambiguous language here.

Id. at 264. *But cf. United States v. Vig*, 167 F.3d 443, 449 (8th Cir. 1999) ("Thus, based on the plain meaning of the statute, and bolstered by the absence of legislative history to the contrary, we hold that computer image files are encompassed within the meaning of 'other matter' in section 2252(a)(4)(B)"). Nevertheless, even assuming *arguendo* this is a correct holding and can be analogized to the present statutory term "other material," no "computer image files" contacting child pornography were located on Cray's computer.

2. Cray's Procedural "Actual Innocence" Claim

For purposes of § 2255's one-year limitations period, Cray's case became final on October 1, 2012, when the Supreme Court denied Cray's petition for writ of *certiorari*. Thus, at this late date Cray is seemingly "procedurally barred" from filing a § 2255 motion. But, the Eleventh Circuit has long held that the § 2255(f) one-year limitations period is not a jurisdictional bar, but "'a garden-variety statute of limitations…'" that can be waived. *In re Jackson* ___ F.3d ___, 2016 WL 3457659 * 3 (11th Cir. June 24, 2016) (citation omitted). Accordingly, "[a]ctual innocence, if proved, may serve as a gateway through which a petition may bring an untimely federal habeas petition." *Smith v. United States*, 637 Fed. Appx. 572, 572 (11th Cir. 2016) (citing *McQuiggin v. Perkins*, 133 S.Ct. 1924, 1928 (2013)). "In other words, a credible showing of actual innocence may allow a prisoner to pursue his constitutional claims . . . on the merits notwithstanding the existence of a procedural bar to relief." *McQuiggin,* at 1931. "This rule, or fundamental miscarriage of justice exception, is grounded in the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons." *Herrera v. Collins*, 506 U.S. 390, 404 (1993). However, the Supreme Court has been clear that "habeas corpus petitions that advance a substantial claim of actual innocence are extremely rare" and the exception only applies in limited circumstances: "the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Schlup v. Delo*, 513 U.S. 298, 327 (1995); *See also*, *House v. Bell*, 547 U.S. 518, 537 (2006). Moreover, "[i]t is important to note in this regard that 'actual innocence' means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998).

As has been discussed herein, Cray did not possess any of the statutorily-required "material" in order to be found guilty of the Count 2 possession charge under § 2252A(a)(5)(B). Therefore, Cray is "actually [factually] innocent" of that offense.

B) CRAY IS NOT TIME-BARRED NOTWITHSTANDING HIS "ACTUAL INNOCENCE" CLAIM

In addition to his "actual innocence" claim, Cray also argues that the time-bar to filing this present motion can be excused for still another reason. In *Martinez v. Ryan*, 132 S.Ct. 1309, 1320 (2012) the Supreme Court held that,

> Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was *no counsel* or counsel in that proceeding was ineffective.

Id. (emphasis added). Subsequently, in *Trevino v. Thaler,* 133 S.Ct. 1911 (2013), the Court added that the rule set forth in *Martinez* applied not only where permission to raise an ineffective assistance claim on direct appeal is expressly denied, *but also in cases in which it was "virtually impossible," as a practical matter, to assert an ineffective assistance claim before collateral review*. *Id*. at 1915 (quotation marks omitted, emphasis added). Cray contends the legal proposition set forth above in both *Martinez* and *Trevino*, applies equally to first-opportunity-to raise ineffective claims in a federal collateral proceeding. It is similarly "virtually impossible" to raise ineffective assistance claims on direct appeal in federal court. To be sure, "[t]he court finds that this issue is improperly before it, as claims of ineffective assistance of counsel may not be considered on direct appeal [citation omitted] . . .This claim is properly raised by collateral attack in the district court." *United States v. Arango*, 853 F.2d 818, 823 (11th Cir. 1988); *Mills v. United States*, 36 F.3d 1052, 1055 (11th Cir. 1994) (same).

In *Ramirez v. United States*, 799 F.3d 845 (7th Cir. 2015), the Seventh Circuit applied this same principle to § 2255 motions. And as stated by one circuit judge, "[i]f *Martinez* and *Trevino* have an animating principle, it is that a prisoner must have at least one opportunity to present a claim that trial counsel was ineffective — and to present it with the assistance of effective counsel." *United States v. Lee*, 811 F.3d 272, 273 (8th Cir. 2015) (Kelly, C.J., dissenting from denial of panel rehearing). Cray has not had that "one opportunity" to bring his ineffective assistance or other constitutional claims.

This is not to say a federal prisoner is entitled to appointment of counsel for post-conviction proceedings. *Martinez* and *Trevino* do strongly imply (or even outright hold), that if due to *no counsel* or ineffective assistance of counsel, a prisoner defaults on his first and only opportunity to raise a constitutional claim in a post-conviction motion, then that default should be excused and no procedural bar erected. Accordingly, and for this reason, Cray should likewise be excused from his procedural and/or time-bars.

C) CRAY'S SUBSTANTIVE CONSTITUTIONAL CLAIM # 1 – DOUBLE JEOPARDY VIOLATION

Every court to have decided the issue, including this Circuit, has held that Possession of Child Pornography in violation of 18 U.S.C. § 2252A(a)(5)(B) is a lesser included offense of Receipt of Child Pornography in violation of 18 U.S.C. § 2252A(a)(2). Concurrent conviction under both subsections violates the Double Jeopardy Clause. At least, where the underlying criminal conduct is based upon the same set of facts and same time frame as in the present case. *See*, *United States v. Bilus*, 626 Fed. Appx. 856, 870 (11th Cir. 2015) (reversing and remanding with instructions to vacate the possession count because under the statute "possession" is a lesser included offense of "receipt"); *United States v. Bobb*, 577 F.3d 1366, 1374-75 (11th Cir. 2009) (finding convictions for both "receipt" and "possession" under the statute to be in violation of the Double Jeopardy Clause. But in that case no such violation occurred due to the commission of the offenses during different time frames, thus, constituting separate and distinct crimes); *United States v. Benoit*, 713 F.3d 1, 7 & 14 (10th Cir. 2013) ("We agree with Benoit that possession is a lesser included offense of receipt in cases in which the same child pornography forms the basis of each charge."); *United States v. Dudeck*, 657 F.3d 424, 430-31 (6th Cir. 2011) (agreeing with the consensus of courts that "possession" of pornographic material is a lesser included offense of "receipt," but there is no Double Jeopardy violation if the two offense are based upon different separate and distinct conduct); *United States v. Muhlenbruch*, 634 F.3d 987, 1003 (8th Cir. 2011) ("We agree with the analysis of our sister circuits and recognize that, as in *Ball*, proof of receiving child pornography under § 2252(a)(2) necessarily includes proof of illegal possession of child pornography under § 2252(a)(4)(B), and Congress did not intend to impose multiplicitous punishment for these offenses."); *United States v. Davenport*, 519 F.3d 940, 947-48 (9th Cir.2008) (Same); *United States v. Miller*, 527 F.3d 54, 72 (3d Cir.2008) ("We therefore hold that the entry of separate convictions for the same offense under both § 2252A(a)(2) and § 2252A(a)(5)(B) contravenes the double jeopardy clause…").

Because Cray was convicted under statutory subsections prohibiting both "receipt" and "possession," one of those convictions must be vacated.

D) CRAY'S SUBSTANTIVE CONSTITUTIONAL CLAIM # 2 – INEFFECTIVE ASSISTANCE OF COUNSEL

Cray claims that his attorney rendered ineffective assistance by failing to preserve in the district court, and raise on appeal (if necessary), Cray's "actual innocence" of the

Count Two possession charge. Additionally, Cray's attorney performed ineffectively by failing to preserve and raise on appeal the above Double Jeopardy claim. As has been quoted herein, there was ample case law available to Cray's attorney so as to raise both of those arguments, with a "reasonable probability" of success. Accordingly, as stated by the Supreme Court, "[a]n attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*." *Hinton v. Alabama*, 134 S.Ct. 1081, 1089 (2014). Cray was prejudiced in both instances. If his attorney had made the above substantive arguments, there was at least a "reasonable probability" Cray would not have been convicted of Count Two. It is of no consequence that the sentence imposed on Count Two was ordered to run concurrently with that of Count One. That fact does not eliminate the existing prejudice. *See*, *e.g.*, *Ball v. United States*, 470 U.S. 856, 864-65 (1985) ("[t]hus, the second conviction, even if it results in no greater sentence, is an impermissible punishment."). And, "[t]he separate *conviction*, apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored."). *Id.* (emphasis in original); *Rutledge v. United States*, 517 U.S. 292, 302 (1996) ("Under *Ball*, the collateral consequences of a second *conviction* make it as presumptively impermissible to impose as it would be to impose any other unauthorized cumulative sentence.") (emphasis added).

E) CRAY'S SUBSTANTIVE CONSTITUTIONAL CLAIM # 3 – INEFFECTIVE ASSISTANCE OF COUNSEL SPECIFICALLY AS IT RELATES TO THE ELEVENTH CIRCUIT'S OPINION ON APPEAL

On appeal, Cray raised the issue, *inter alia*, that the District Court abused its discretion by denying Cray's Motion for Acquittal. (DE 97). In affirming the District Court's denial of that motion, the Eleventh Circuit wrote:

> Pursuant to § 2252A(a)(2) of Title 18 of the U.S. Code, it is illegal for any person to (1) knowingly receive or distribute (2) any child pornography or material containing child pornography (3) that has been mailed or transported in or affecting interstate commerce by any means, including by computer. 18 U.S.C. § 2252A(a)(2). Pursuant to § 2252(A)(a)(5)(B), it is illegal for any person to (1) knowingly possess or access *with intent to view* (2) any material that contains an image of child pornography (3) that has been transported in or affecting interstate commerce by any means, including by computer. 18 U.S.C. § 2252A(a)(5)(B).
> . . .
> Because the jury reasonably could find beyond a reasonable doubt that Cray accessed the Website *with intent to view* child pornography, in violation of § 2252A(a)(5)(B) and (a)(5)(B), the district court did not err in denying his motion for judgment of acquittal.

Cray, 450 Fed. Appx. at 927-28 (emphasis added).

Problem is, Cray's offenses occurred "[b]eginning on or about March 28, 2008, and continuing at least until on or about April 14, 2008, and thereafter, the exact dates being unknown to the Grand Jury…" (DE 1). As quoted above, the relevant statute was amended effective October 8, 2008. Among the statutory changes brought about by that amendment, was the addition of the statutory wording "with intent to view." The Eleventh Circuit recognized this in *United States v. Shiver*, 308 Fed. Appx. 640, 642 n. 4 (11th Cir. 2008):

> we also note that in October 2008, Congress amended § 2252A(a)(5)(B) by inserting "or knowingly accesses with intent to view," after "possesses"…This amendment has essentially settled the question in this case of whether a defendant must exercise control or dominion over an image for purposes of § 2252A(a)(5)(B). Under the statute's present language, control appears unnecessary, so long as an individual knowingly accesses the illicit images.

Thus, at the time of Cray's offenses, "intent to view" was not an element of the crime. Not only did the Circuit Court quote this amended passage in deciding this case, but it was upon such basis the Eleventh Circuit found that, "[b]ecause the jury reasonably could find beyond a reasonable doubt that Cray accessed the Website *with intent to view* child pornography, in violation of § 2252A(a)(5)(B) and (a)(5)(B), the district court did not err in denying his motion for judgment of acquittal" *Cray*, 450 Fed. Appx. at 928. In other words, the Eleventh Circuit affirmed Cray's conviction (at least as to this particular issue raised on appeal), based upon a statute that had not been enacted and was not the law at the time of Cray's offenses.

If Cray's appellate counsel had raised this issue on a Petition for Rehearing, it is almost a certainty the Court of Appeals would have recognized its error, reheard this issue, and applied the correct statute. But counsel failed to do so. Cray argues such failure constituted ineffective assistance and Cray was prejudiced. The "reasonable probability" of a rehearing is a different result sufficient to constitute prejudice under *Strickland*. *See*, e.g., *Wiggins v. Smith*, 539 U.S. 510, 334 (2003) ("In *Strickland*, we made clear that, to establish prejudice, a 'defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'") (*Strickland* citation omitted).

F) CRAY'S "DOUBLE DEFAULT" OF HIS CONSTITUTIONAL CLAIMS

Cray currently raises the claim that his attorney performed in a constitutionally ineffective assistance manner by failing to raise these above substantive issues in the trial court and on direct appeal. Consequently, not only is Cray in default of the one-year limitations period to file a timely § 2255 motion asserting these claims, but also has defaulted these claim in this Court at trial and before the Eleventh Circuit on appeal.

To be sure, as a general rule, any claims not raised on direct appeal are procedurally defaulted and may not be raised on collateral review unless the movant shows "(1) 'cause' excusing [the] procedural default, and (2) 'actual prejudice' resulting from the errors." *United States v. Frady*, 456 U.S. 152, 168 (1982) (citations omitted). Or, demonstrates that he is "actually innocent." *Bousley*, 523 U.S. at 622 (citations omitted); *Mills v. United States*, 36 F.3d 1052, 1054 (11th Cir. 1994). Nevertheless, a claim of ineffective assistance of counsel is not subject to the procedural default rule. *Massaro v. United States*, 538 U.S. 500, 504 (2003). An ineffective assistance claim may be raised in a collateral proceeding under § 2255 regardless of whether the movant could have raised the claim on direct appeal. *Id*. Thus, Cray's "double default" of these above substantive issues does not procedurally bar Cray presently.

IV. CONCLUSION

Due to the Double Jeopardy violation, Cray is entitled to the vacation of the conviction on either Count One or Count Two. However, this does not fully cure such violation. That is, merely vacating one of Cray's convictions provides the Government with an unwarranted windfall that is unfair and manifestly unjust. As shown, Cray was improperly and unconstitutionally charged in two multiplicitous counts. In order to obtain conviction on both of those charges, the Government was required to introduce evidence sufficient to prove beyond a reasonable doubt each and every element of both counts. It is axiomatic then, that if Cray had been charged in only one count, the Government's evidentiary burden would have been less. Consequently, the jury was subjected to the introduction of evidence above and beyond that necessary to convict Cray on either count. This arguably resulted in prejudice to Cray due to the Government's constitutional Double Jeopardy violation. At this point it is not possible to predict what effect the Government's evidentiary presentation would have had on the one remaining count, if evidence necessary to prove the count omitted due to its Double Jeopardy violation had not been presented to the jury. Nonetheless, logic dictates that the more incriminating evidence a jury is subjected to, the more prejudicial it is to a criminal defendant.

In sum, in addition to the vacation of either Count One or Two, Cray is entitled to a new trial on the remaining counts. In this way, the jury will not be exposed to evidence the Government presented in the previous trial which formed the basis for Cray's conviction on the charge subject to the unconstitutional Double Jeopardy violation.

Finally, Cray requests the dismissal (vacation) of all charges contained in the Indictment for all the other reasons set forth and argued above.

Respectfully submitted,

/s/ Jeremy Gordon
Jeremy Gordon
Jeremy Gordon, PLLC
1848 Lone Star Road, Suite 106
Mansfield, TX 76063
Tel: 972-483-4865
Fax: 972-584-9230
Email: Jeremy@gordondefense.com
TX Bar No. 24049810

Counsel Pro Hac Vice for Reginald Cray

/s/ Amy Lee Copeland
Amy Lee Copeland, LLC
P.O. Box 23358
Savannah, GA 31403
Tel: 912-544-0910
Fax: 912-349-6097
Email: ALC@roco.pro
GA Bar No. 186730

Local Counsel for Reginald Cray